(2) 95-421

NO. _____

Supreme Court, U.S.
FILED
AUG 29 1995
CLERK

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**IN THE**

**SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM, 1995**

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MOHAMMED MALEKZADEH
Petitioner

VS.

THE STATE OF TEXAS
Respondent

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**ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS, FIRST JUDICIAL DISTRICT OF TEXAS**

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# APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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IN THE COURT OF APPEALS

FOR THE FIRST DISTRICT OF TEXAS

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MOHAMMED MALEZADEH

Defendants-Appellants.

Versus

THE STATE OF TEXAS

Plaintiff-Appellee.

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Appeal from the Court of Appeals
First District of Texas

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On Appeal from the 351st District Court
Harris County, Texas
Trial Court Cause Nos. 524,076 and 524,077

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(December 8, 1994)

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OPINION ON MOTION FOR REHEARING

We overrule appellant's motion for rehearing, withdraw our opinion of

September 29, 1994, and issue this opinion in its stead.

After a trial to the court, Mohammed Malekzadeh, the appellant, was found guilty of indecency with a child and eight counts of fraudulent possession of a prescription form, under former Tex. Rev. Civ. Stat. art. 4476-15 §4.09(a).[1] For the charge of indecency with a child, his punishment was assessed at 20 years in prison and a $10,000 fine; for the fraudulent possession of prescription forms, his punishment was assessed at 10 years in prison and a $5,000 fine. The court granted the State's motion that the two periods of imprisonment will run

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[1]Act of June 3, 1985, 69th Leg., R.S., ch. 227, §10, 1985 Tex. Gen. Laws 1102, 1123, *repealed and codified by* Act of June 14, 1989, 71st Leg., R.S., ch. 678, §§13 and 1, 1989 Tex. Gen. Laws 2230, 3165, 2942. The current version is found at Tex. Health & Safety Code §481.129 (Vernon 1992).

consecutively, not concurrently. We affirm.

I.

FACT SUMMARY

The complainant, a female, was 16 years old in February-1989, when she began working as a secretary at the appellant's automobile repair business. On the evening of February 13, the appellant asked her to accompany him to his apartment to help him with his English lessons. The appellant offered to pay her for doing so, and she agreed. Once they arrived at his apartment, the appellant left for about 20 minutes, and returned with drinks and food from McDonald's. Shortly after the complainant ate, she began to feel very drowsy. The appellant then gave her a drink, other than the one from McDonald's, which he claimed would help her. Something in the food or drink made her feel so unusually sleepy and

drowsy that she concluded later she had been drugged. The appellant then took her into the bathroom applied shaving cream to her pubic area, and shaved her pubic hair. The complainant's next memory after that was of waking the following morning when her sister called the appellant's apartment, trying to locate her. Because complainant was still too drowsy to talk, the appellant spoke to her sister, and gave her directions to his apartment to pick her up. The complainant then got out of bed; the appellant helped her put on her clothes, and helped her to the living room couch. Soon afterward, the complainant's sister and father arrived, and took her home. The complainant remained in the same drowsy state during the next two days, drifting in and out of full sleep, without ever fully awakening to normal alertness. On February 16, when she was first able to communicate

effectively, complainant called the police.

Based on Officer Peck's affidavit about the information complainant gave, search warrants were issued for the appellant's home and place of business, as well as a warrant for the appellant's arrest. The appellant was not at his place of business when Peck and the other officers arrived there; they waited, and he arrived about 30 minutes later, carrying a briefcase. The officers arrested him, and then searched him first. In his left sock, they discovered a small bottle containing a white substance. They then searched the business premises and found documents on the desk with the complainant's name on them. After that, they searched the appellant's briefcase, and found seven blank prescription forms. The officers then went to his apartment, where they searched, and seized other

items. The appellant was then taken to the police station, where he made an oral statement, which Peck typed. The appellant read it, made no changes, but refused to sign it.

**Objection to oral confession**

In point of error one, the appellant asserts that the trial court erroneously admitted a typed statement of the appellant's oral confession that he had refused to sign. The typed statement is reproduced below, with the italicized portions indicating those that the trial court admitted into evidence:

> *[The complainant] came over to my apartment at about 6:00 p.m. She told me that she had a headache so I gave her some of my sleeping pills, it's Lorazepam, it makes me sleep. She just wanted to feel better.*
>
> *I went to McDonald's and brought her back a hamburger and coke. She ate when I came back to the apartment.*
>
> We went to my bed and she kissed me for about twenty (20)

minutes. She wanted to make love to me. *At about 11:30 p.m. she called her sister and said that she would be home later.* [The complainant] did not want to go home, she just wanted to make love and watch the love movies.

She made love to me, and said she "came" three (3) times. She made me put my penis inside of her. She put her mouth on my penis, and she made me put my mouth on her vagina.

I had been drinking a beer and about four glasses of Johnnie Walker, so I was feeling drunk. *We were in my bed and some of our clothes were on and some were off.*

*She wanted to see a movie so I put in a scary [sic] one but she wanted to see the love movies. She watched the Playboy movie, and she watched some of "Shaved Part II" she asked me to do her like they did in the movie.*

*She told me to use the scissors just to cut off the top of her hair down there. She made me put shaving cream on her then after the hair was gone she cleaned herself off.*

She just watched movies all night and she slept some, too. *The next day her sister and dad came and took her home.*

The appellant objected that the entire statement was inadmissible, by virtue of article 38.22 of the Texas Code of Criminal Procedure. In response, the trial court admitted the portions of the statement underlined above, and excluded the remainder.

When a defendant's statement is reduced to writing but he refuses to sign it, the statement is considered an oral statement. *See* **Dockins v. State**, 852 S.W.2d 50, 51 (Tex. App.--Texarkana 1993, pet. ref'd). When a defendant who is in the custody of the police makes an oral statement in response to interrogation, the statement is admissible at trial if it was electronically recorded and meets the others conditions set forth in Tex. Code Crim. P. art. 38.22, section 3(a) (Vernon Supp. 1994). Here, because the statement was not electronically recorded, it does not meet the requirements of article 38.22

§3(a). However, even if an oral statement made in response to custodial interrogation is not recorded, or it does not meet one of the other conditions of subsection (a), it is admissible if it "contains assertions of facts or circumstances that are found to be true and which conduce to establish the guilt of the accused, such as the finding of secreted or stolen property or the instrument with which he states the offense was committed." Tex. Code Crim. P. Ann. art. 38.22, §3(c) (Vernon Supp. 1994). Subsection (c) lists two examples -- finding secreted or stolen property of the instrument with which the defendant said he committed the offense. These examples are illustrative only, and are not a limitation on the circumstances "which conduce to establish" guilt when shown to be true. **Gunter v. State**, 858

S.W.2d 430, 448 (Tex. Crim. App. 1993). Oral statements made by an accused need not *lead to* or *result in* the discovery of incriminating evidence so long as the statutory requirements are met. **Id**. The requirements of section 3(c) are satisfied when the suspect makes assertions about facts about which the police are unaware at the time of the statement and which are later verified and found to be true. **Id**. Even if only one of the assertions in an oral statement is true and conduces to show the guilt of the accused, the confession is admissible in its entirety. **Id**. at 449.

There were two assertions in the appellant's oral statement that were later found true and tended show his guilt. First, the appellant stated that he showed the complainant a sexually explicit film by the name of "Shaved Part II" and that the complainant asked her to "do to her

like they did in the movie." The search warrant for his house instructed the officers to seize any tapes depicting the complainant or any other children, clothed or unclothed. At the time the officers executed the warrant, they seized 35 tapes. The officer who took the statement from the appellant testified that another officer took possession of 35 tapes and "bagged" them. She said she did not know the titles of the tapes until after she took the appellant's statement. It was then that she made an inventory of the names of the tapes and discovered that one of the tapes was titled "Shaved Part II."

Second, the appellant stated that he possessed Lorazepam and had given some to the complainant on the night of the offense. At the time of appellant's statement, the police had already discovered a prescription bottle containing 1.4 grams of white powder. The

evidence in this case shows that on the day of appellant's arrest, the police delivered two prescription bottles to the HPD crime lab for analysis. Dr. Davis, a police chemist, testified that he analyzed 1.4 grams of an unknown substance contained in one of the prescription bottles and found that it contained Lorazepam. Davis testified that to analyze an unknown substance,

> We have a *battery* of standardized tests ... [consisting of] what is known as chemical spot tests which are color tests to help us determine the class of compounds and substances may fall in. Once we fall into that we then verify that by going into instrumental analysis. An ultraviolet spectrometer is the most common. The next one is common is usually combination or combined procedure known as GCM is or gastromortography to positively identify the substance.

[Emphasis added).

Appellant was arrested at 1:30 p.m.; he gave his statement at 4:00 p.m. The

trial judge could have reasonably concluded that the battery of tests required to identify the unknown powder substance was not completed in the two and one-half hours that elapsed between appellant's arrest and the time he made his statement. Thus, the trial judge could also have reasonably concluded that the police were unaware that the powder substance was actually Lorazepam at the time appellant gave his statement.

Davis also testified that Lorazepam was a "central nervous system depressant or tranquilizer." The identity of the substance as Lorazepam conduced to establish the appellant's guilt because it established that the appellant had, in his possession, the means to induce the complainant to become extremely drowsy and sleepy for several days, as the complainant testified he had, by "drugging" her, done.

The appellant's oral statement that Peck transcribed fell within the scope of subsection 3(c) of article 38.22. The statement as admissible, and the trial court did not err in overruling the appellant's objection.

We overrule point of error one.

**Motion to suppress**

In point of error five, the appellant contends that the trial court committed reversible error in denying his motion to suppress any evidence seized at his home or place of business on the day of his arrest. The appellant objected that Peck's affidavit in support of the search warrants was insufficient under Tex. Code Crim. P. Ann. articles 18.01 and 18.02 (Vernon Supp. 1994).

The evidence that appellant contends was illegally seized at his place of business--the blank prescription forms--was recovered during a search incident to

lawful arrest; they were not discovered during the execution of the search warrant. Appellant was carrying the briefcase at the time he was arrested, and the briefcase was searched incident to the arrest. The appellant has not attacked the search warrant incident to arrest. A lawful arrest authorizes a limited search of the person arrested without a search warrant. **Gauldin v. State**, 683 S.W.2d 411, 414 (Tex. Crim. App. 1984). Here, insofar as the record shows, the scope of the search did not exceed those limits.

The rule is that

> warrantless searches of luggage or other property seized at the time of an arrest cannot be justified as incident to that arrest either if the "search is remote in time or place from the arrest," or no exigency exists. Once law enforcement officers have reduced luggage or other personal property not immediately associated with the person of the arrestee to their exclusive control, and there is no longer any danger that the arrestee might gain access to

> the property to seize a weapon or destroy evidence, a search of that property is no longer an incident of the arrest.

**United States v. Chadwick**, 433 U.S. 1, 15, 97 S.Ct. 2476, 2485 (1977)(citation omitted).

In **Carrasco v. State**, 712 S.W.2d 120, 122-23 (Tex. Crim. App. 1986), the defendant argued that because the police had exclusive control over his bag at the time they searched it, the search could not be justified as an incident of arrest. The Court of Criminal Appeals held that the police did not have exclusive control over the bag because the search was made at the scene of the arrest, and the appellant was only a few feet away at the time, and could have obtained access to a weapon, had one been in the bag. **Id.** The court distinguished **Chadwick**, *in* which the warrantless search was conducted after the property had been removed from the arrest

scene, and the defendant had been placed in custody. 433 U.S. at 4, 97 S.Ct. at 2480.

The record affirmatively shows that the briefcase had *not* been reduced to the exclusive control of law enforcement officers at the time of the search. Appellant was carrying the briefcase at the time he was arrested; it was within his immediate control. The search of the briefcase was performed in appellant's presence at the scene of the arrest. Under **Carrasco**, the search of appellant's briefcase was valid as a search incident to arrest.

We overrule point of error five.

**Objection to extraneous crimes, wrongs, or acts**

In point of error three, the appellant asserts that the trial court committed reversible error by overruling his objections, under rule 404(b) of the

Texas Rules of Criminal Evidence, to testimony concerning three extraneous crimes, wrongs, or acts.

The three extraneous matters were the small bottle of white powder -- purportedly cocaine -- found in the appellant's sock at the time of his arrest; marijuana found in his apartment; and a homemade videotape -- purportedly of the appellant committing unspecified sexual acts with a drugged female other than the complainant -- also found in his apartment.

When Peck testified to finding the small bottle of white powder in the appellant's sock, the appellant objected that that was an extraneous matter unrelated to the charges against him. The prosecutor responded that the testimony was "going to be related" to the indecency charge. The trial court overruled the objection, but stated, "[I]f it turns out

it's not relevant to that issue then the court will not consider it for any purpose." Later, after both sides had rested, the trial court asked the prosecutor about the identity of that substance, and the prosecutor responded that it was cocaine, not Lorazepam. The court then stated that that item was not "of any particular relevance" and the prosecutor agreed.

Peck also testified that when she searched the appellant's apartment, she found "something that was believed to be marijuana." The appellant did not object. Shortly after, however, the trial court stated, *sua sponte*,

> For the purposes of the record, at this point, the court having heard the detective mention she found what appeared to be marijuana, to the extent that it becomes a substance that the officer testified to with a great degree of reliability, the court will now note that the court will not utilize that at this point, unless somebody can

> show me some high degree of relevance. The court will not consider that for any probative value. And Rule 403, even though it's not specifically addressed yet by counsel, this is one example where the court will not allow that unless the state can show some expert or some other type of testimony that marijuana could have the kind of effect that affected this complaining witness, and the description of her being drugged like she indicated that she was.

No testimony or other evidence about the effects of marijuana use was presented during the balance of the trial.

Finally, Peck testified to finding the homemade videotape. The appellant objected that the conduct it showed was an extraneous offense, if any, and had nothing to do with juveniles because the female appearing on the tape had been identified as an adult. After listening to the prosecutor and defense counsel each argue the admissibility of testimony concerning the videotape, the trial court

stated that the testimony was of no relevant "right now," and sustained the appellant's objection.

If a trial court admits evidence subject to its later being "connected up," the party objecting to the evidence must re-urge the objection after both sides rest; if the objection is then sustained, the party who objected must ask that the evidence be stricken. **Fuller v. State**, 829 S.W.2d 191, 198-99 (Tex. Crim. App. 1992). Here, the trial court's inquiry, *sua sponte*, about the cocaine, and its stated conclusion that testimony about the cocaine was not of any particular relevance to its decision as the finder of fact, were, together, the functional equivalent of sustaining the original objection and giving an instruction to disregard the evidence -- as was the court's statement, again *sua sponte*, that it would not consider the testimony about

the marijuana. Finally, with respect to testimony concerning the videotape, the appellant's objection was, in fact, sustained, and the appellant requested no further relief. With respect to all three matters about which the appellant complains here, nothing is presented for review.

We overrule point of error three.

**Prosecutorial misconduct**

In point of error six, the appellant addresses the three extraneous matters that were challenged under point of error three. He contends that the introduction of that evidence and the prosecutor's false and misleading statements about it constituted deliberate prosecutorial misconduct that deprived him of a fair trial, in violation of his rights under the sixth amendment. To the extent that the appellant complains about the introduction of the evidence itself, this

point of error duplicates the complaint that is the subject of point of error three, and, to that extent, is without merit, for the reasons set forth in the discussion of that point.

The appellant does not in his brief direct our attention to any juncture at which he raised this complaint in the trial court and preserved the matter for review, under Tex. R. App. P. 52. Thus, the issues in this point were not preserved separately from those already considered and overruled.

We overrule point of error six.

**Bill of exceptions**

In point of error two, the appellant asserts that the trial court committed reversible error by refusing to allow him to complete a bill of exceptions.

After the complainant testified on direct, the appellant moved to discover a "summary" Peck took down of an oral

statement the complainant made to Peck. Tex. R. Crim. Evid. 614(a). Both parties then questioned the complainant on voir dire, and the trial court concluded that the statement was Peck's statement and not the complainant's; accordingly, the trial court denied the appellant's motion. The following exchange then took place:

> Defense: Then, for purposes of the record, I ask that that portion of Donna Peck, that contains statements made by [the complainant]. be marked and identified an admitted into evidence for purposes of the court's ruling, and *for purposes of impeachment*.
>
> ....
>
> The court: We'll go ahead and hold it until Detective Peck comes up and we can get her to identify that is, in fact, *probably needs to be better identified for the purposes of the ruling of 614(a)* and right now you do have a couple of other documents that you're going to proceed on.
>
> Defense: Yes, your Honor. So I'm clear on the court's ruling, so the record is clear *at this point*, the court is not allowing

> the report by Detective Peck to be *admitted in evidence for purposes of appeal*, for purposes of this hearing?
> The court: *At this point*, that is correct.

(Emphasis added.) Peck testified immediately after the complainant.

When a trial court excludes evidence, the proponent of that evidence must be allowed to make an offer of proof or bill of exceptions; the right to do so is absolute. **Tatum v. State**, 798 S.W.2d 569, 571 (Tex. Crim. App. 1990); *see also* Tex. R. App. P. 52(b) (proponent of excluded evidence *shall* ... be allowed to make" offer or bill) (emphasis added). A trial court is not required, however, to allow the proponent of excluded evidence to make his bill immediately upon demand. The rule mandates only that the proponent be allowed to make his bill before the charge is read to the jury. Tex. R. App. P. 52(b). Within that limitation, the timing

of making the bill is within the background rule; a trial court is vested with discretion to control the course and conduct of the proceedings before it. Tex. R. Crim. Evid. 610(a). The court is to exercise that discretion so as to make the interrogation and presentation effective for ascertaining the truth, while avoiding needless consumption of time and protecting witnesses from harassment or undue embarrassment. Id.

The burden is on the appellant to present a record on appeal that shows error requiring reversal. Tex. R. App. P. 50(d). Here, the record does not show the trial court refused to permit the appellant the opportunity to make a bill of exceptions to preserve the excluded summary. The trial court, by its statement that the summary needed to be "better identified for the purposes of the ruling of 614(a)," expressed both a

conclusion that the summary was not sufficiently authenticated and a willingness to reconsider its ruling excluding the summary after testimony from Peck, and, in turn, concluded that a bill of exceptions embodying the summary as, at that point, premature.

The appellant has demonstrated neither that the trial court did more than defer introduction of the summary, nor that the trial court thereby abused its discretion.

We overrule point of error two.

**Insufficient evidence**

In point of error four, the appellant contends that the evidence is insufficient to support his conviction for indecency with a child. In his supporting argument, the appellant identifies the particular respect in which he asserts the evidence was insufficient; he argues specifically that the State failed to prove that the

appellant touched the complainant.

We review the evidence in the light most favorable to the verdict, to determine whether any rational trier of fact could have found all the elements of the offense beyond a reasonable doubt. **Jackson v. Virginia**, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789 (1979). This standard of review applies to both direct and circumstantial evidence. **Green v. State**, 840 S.W.2d 394, 401 (Tex. Crim. App. 1992); **Palmer v. state**, 857 S.W.2d 898, 899 (Tex. App.--Houston [1st Dist.] 1993, no writ). We may not act as a thirteenth juror in assessing the evidence. **Moreno v. State**, 755 S.W.2d 866, 867 (Tex. Crim. App. 1988). If there is evidence that establishes guilt, beyond a reasonable doubt, and if the trier of fact believes that evidence, we may not reverse the judgment on sufficiency of the evidence grounds. **Id**. In the light most favorable

to the verdict, the evidence shows the following.

The elements of the offense of indecency with a child are that the accused (1) knowingly or intentionally; (2) engaged in sexual contact; (3) with a child; (4) younger than 17 ears of age; (5) who was not the spouse of the accused. **Guia v. State**, 723 S.W.2d 763, 765 (Tex. App.--Dallas 1986, pet. ref'd); Tex. Penal Code §21.11 (Vernon 1989). Sexual contact is defined in the Penal Code as "any touching of the anus, breast, or *any part* of the genitals of another person with the intent to arouse or gratify the sexual desire of any person." Tex. Penal Code §21.01(2) (Vernon 1989)(emphasis added). "Genital" is defined as the external organ or organs of regeneration. 6 Oxford English Dictionary 443 (2d ed. 1989)

The appellant argues that the

evidence shows, at most, that he shaved the complainant's pubic hair, the only contact with complainant's genital area was with the razor, and not with the appellant. We disagree. On direct examination, the complainant testified that although she was very drowsy and sleepy at the time, she remembered the appellant taking her into his bathroom, and that he had shaving cream and a razor. The questioning continued:

State: What did he do with the shaving cream?

Davis: He put it on my vagina, on my pubic hair.

State: What did he do with the razor?

Davis: He shaved the pubic hair around my vagina.

The complainant's testimony that the appellant applied shaving cream to and shaved her genital area is sufficient

evidence from which the jury could conclude that the appellant touched some part of the complainant's genitals. Proof of flesh-to-flesh contact is not required. **Zewoldermariam v. State**, 730 S.W.2d 354, 355 (Tex. App.--Dallas 1987, no pet.). The focus is, instead, on the person who is the target of the accused's actions; the evidence is sufficient if it indicates, as here, that the appellant's act engendered in the other person the perception or sensation of being touched. **Guia**, 723 S.W.2d at 766.

The remainder of the appellant's argument is inapposite; it relies upon the proposition that, where the conviction is based on circumstantial evidence, the State must disprove every outstanding reasonable hypothesis except that of the accused's guilt for the evidence to be sufficient to support that conviction. The reasonable hypothesis "construct" has,

however, been discarded for use in appellate review in all cases that, like this one, were tried on or after November 6, 1991. **Geesa v. State**, 820 S.W.2d 154, 165 (Tex. Crim. App. 1991); **Jones v. State**, 845 S.W.2d 419, 423 n.3 (Tex. App.--Houston [1st Dist.] 1992, pet. ref).

We overrule point of error four.

We affirm the judgment.

/s/ Michol O'Connor

Justices Cohen and Hutson-Dunn also participating.

Do not publish. Tex. R. App. P. 90

OFFICIAL NOTICE
COURT OF CRIMINAL APPEALS
May 31, 1995
COA#: 01-92-00887-CR
RE: Case No. 0358-95
STYLE: MALEKZADEH, MOHAMMED

On this day, the Appellant's Petition for Discretionary Review has been REFUSED.

Thomas Lowe, Clerk

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